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## **And Justice for All: An Alternative Decision to *Williams v. Nassau County Medical Center* to Ameliorate the Harsh Impact of New York's Late Notice of Claim Statute on Infant Medical Malpractice Plaintiffs**

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Strict construction of New York State's late notice of claim statute<sup>1</sup> has unintentionally thwarted the lofty goals of equal access to justice and equal protection under the law through *de facto* economic segregation of infant medical malpractice plaintiffs. This inequity has its roots in the simple happenstance of an infant or pregnant mother seeking medical treatment at a municipal rather than a private hospital, even if the choice of hospital is involuntary. The mere selection of a public hospital establishes significant obstacles to commencement of a medical malpractice action by a parent or guardian on behalf of an injured minor, and it is often likely that the claim will be barred forever. Considering the more progressive direction of the New York Court of Appeals under Chief Judge Lippman,<sup>2</sup> we believe it is time to reexamine this issue.

Millions of people in the United States, principally racial

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1. N.Y. GEN. MUN. LAW § 50-e (McKinney 2007) (amended 2010).

2. See William Glaberson, *Top Judge Sets Liberal Course for New York*, N.Y. TIMES, February 18, 2010, at A1 (quoting Professor Vincent M. Bonventre "The message he is sending is he doesn't mind fighting for a much more progressive direction at the court."); see also Joel Stashenko, *Boost in Dissents, Criminal Appeals Marks Lippman's Early Tenure*, N.Y.L.J., Aug. 16, 2010, at 1 ("I believe the Court today is not about labels," Judge Lippman said. "It is very much about the law and applying the law to individual cases. It is a commonsense Court.").

and ethnic minorities, face barriers to quality health care.<sup>3</sup> New York's poor and uninsured are segregated into separate and unequal<sup>4</sup> institutions.<sup>5</sup> Uninsured and Medicaid patients account for 4% of hospital discharges at select private hospitals, as opposed to nearly 90% at some public facilities.<sup>6</sup> This two-tiered system results in economically disadvantaged patients being relegated to the "clinic" model of care in which rotating groups of doctors-in-training lack the coordination of care that patients in private hospitals expect from their personal attending physician.<sup>7</sup>

Critics of this system of medical apartheid have decried the negative effects of differential care on health outcomes.<sup>8</sup> For example, a study measuring the rates of primary cesarean sections (C-sections) among women in Los Angeles County, California found that, independent of maternal indices for emergent delivery of a child such as fetal distress, rates varied directly with the socioeconomic status of the mother.<sup>9</sup> The rate of C-sections among women with median family incomes of more than \$30,000 per annum is 22.9% as compared to 13.2%

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3. Brian Smedley et al., *Identifying and Evaluating Equity Provisions in State Health Care Reform*, THE COMMONWEALTH FUND, Apr. 23, 2008, available at <http://www.commonwealthfund.org/Content/Publications/Fund-Reports/2008/Apr/Identifying-and-Evaluating-Equity-Provisions-in-State-Health-Care-Reform.aspx> (noting that in the United States minorities, immigrants, and non-English speakers face barriers to obtaining good health care).

4. A disparaging reference to the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting), arguably one of the most shameful decisions ever issued by the United States Supreme Court.

5. See Arthur Schatzkin, *Variation in Inpatient Racial Composition Among Acute-Care Hospitals in New York State*, 20 SOC. SCI. & MED. 371, 376 (1985).

6. SPARCS 2001 Annual Report Table 9(I), N.Y. STATE DEPT OF HEALTH, (last visited Jan. 20, 2011), [http://www.health.state.ny.us/statistics/sparcs/annual/t2001\\_09.htm](http://www.health.state.ny.us/statistics/sparcs/annual/t2001_09.htm).

7. See Neil Calman et al., *Separate and Unequal Care in New York City*, 9 J. HEALTH CARE L. & POL'Y 105, 111 (2006).

8. See *id.* at 105; see also Christina Frangou, *Data Confirm Effect of Insurance on Surgical Outcomes*, 37:7 GEN. SURGERY NEWS 1 (2010) ("[The] study leaves no doubt that the patients' insurance status is inextricably linked to in-hospital mortality and complications after major surgery . . . patients covered by Medicaid incurred a 97% increased risk for dying while in the hospital, and uninsured patients had a 74% increase in risk compared with privately insured patients.")

9. Jeffrey B. Gould et al., *Socioeconomic Differences in Rates of Cesarean Section*, 321 NEW ENG. J. MED 233, 237 (1989).

among families with median incomes under \$11,000.<sup>10</sup> The rates of C-sections were highest for non-Hispanic whites and lowest for blacks and Mexican Americans.<sup>11</sup> In one study based on data from California hospitals, women with private insurance had the highest C-section rates (29.1%).<sup>12</sup> Successively lower rates were found for patients with public insurance (22.9%), self-pay (19.3%), and indigent services (15.6%).<sup>13</sup> The danger of financial disincentives to public hospitals' ability to deliver quality perinatal care is palpable.<sup>14</sup>

It is unfortunate enough that patients are segregated into separate and unequal forms of care, leading to disparate healthcare outcomes.<sup>15</sup> All the more unsettling, however, is that the New York Legislature and Judiciary also unintentionally subject victims of this system of medical apartheid to separate and unequal access to the court system for compensation for their injuries. The gravamen of this two-tiered *de facto* construct is the doctrine of sovereign immunity and its modern vestige, the notice of claim requirement.

The doctrine of sovereign immunity, deeply rooted in common law and recognized since feudal times, was an absolute bar to actions and assignments of liability against the sovereign.<sup>16</sup> Two separate British common law fictions provided rationales for this absolute immunity. The first held that, even when the sovereign violated a private right, it was presumed that he was deceived into so doing—a form of fraudulent procurement preventing any remedy against the crown.<sup>17</sup> The second held that the sovereign, having conquered the realm or

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10. *Id.* at 234 tbl.1.

11. *Id.* at 236.

12. Randall Stafford, *Cesarean Section Use and Source of Payment: An Analysis of California Hospital Discharge Abstracts*, 80 AM. J. PUB. HEALTH 313, 313 (1990).

13. *Id.* at 314 tbl.1.

14. *See id.* at 315 (noting that insurance claim data for the western United States shows that cesarean sections were 84% more costly than vaginal deliveries—\$5000 versus \$2720). In addition to financial disincentives, access to technology, physician work schedules, presence of trainee resident doctors, patient socioeconomic status, and medical malpractice concerns contribute to observed payor differences. *Id.*

15. *See* Calman et al., *supra* note 7, at 105.

16. WILLIAM BLACKSTONE, *THE SOVEREIGNTY OF THE LAW: SELECTIONS FROM BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND* 95 (Gareth Jones ed., 1973) ("Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him.").

17. *Id.* at 98.

acquired his throne by primogeniture, was an omnipotent ruler who, as the source of all law, could not possibly commit an illegal act.<sup>18</sup> These archaic paradigms were later transplanted into American jurisprudence and continue to exist, albeit in modified form, due to the belief that the government must discharge its duties and responsibilities in as unencumbered a manner as is constitutionally permissible.<sup>19</sup> For example, the United States government retained immunity from tort liability, absent its express consent to be sued, until a limited waiver was provided by the relatively recent passage of the Federal Tort Claims Act in 1946.<sup>20</sup>

The doctrine of sovereign immunity was alive and well in New York State until the Legislature enacted the Court of Claims Act in 1929.<sup>21</sup> For the first time, New York State could be sued in the Court of Claims for common law torts. This waiver of sovereign immunity extended to governmental subdivisions, as well. Subsequent statutes have defined both the manner in which these subdivisions may be sued and the unique defenses that immunize the government from tort liability in certain situations.<sup>22</sup> New York has been reluctant to allow the waiver of sovereign immunity to operate in absolute terms. Statutory immunity defenses are an effort to balance the competing policy concerns of the private rights of injured parties who would otherwise be left without any recourse against necessary freedom of governmental action.<sup>23</sup> Enacted in 1945, the notice of claim requirement of New York General Municipal Law § 50-e is such a provision.<sup>24</sup> Generally, such limitations are

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18. *See id.*; *see also* *Rex v. Kempe*, 1 Lord Raym 49, 52 (1676) (ruling that if the King attempts to grant a title but makes a legal mistake in the process the grant is still valid); *Gledstanes v. Earl of Sandwich*, 4 Man. & G. 995, 1029–30 (1842) (confirming that if a King makes a grant, but is mistaken as to the law, that grant is still valid).

19. *United States v. Thompson*, 98 U.S. 486, 489 (1878) (noting that the doctrine of sovereign immunity in the United Kingdom, later adopted into the U.S. Constitution, was founded on the belief that the sovereign and his agents could better perform their duties free from the distraction of suits being brought against them.).

20. *See* 28 U.S.C.A. §§ 1346(b), 2671–2680 (2006); *Wilcox v. United States*, 117 F.Supp. 119, 120 (S.D.N.Y. 1953).

21. N.Y. CT. CL. ACT § 9 (McKinney 2009).

22. *See e.g.*, *Sharapata v. Town of Islip*, 437 N.E.2d 1104, 1108 (N.Y. 1982).

23. *See Brown v. State*, 674 N.E.2d 1129, 1144 (N.Y. 1996).

24. N.Y. GEN. MUN. LAW § 50-e (McKinney 2009).

strictly construed, since waiver of sovereign immunity is in derogation of common law doctrine.<sup>25</sup>

Before a tort claim can proceed against a public corporation, city, county, town, village, or fire or school district in New York, a notice of claim pursuant to § 50-e must be served within ninety days of the date of accrual of the tort.<sup>26</sup> This requirement is intended to allow the public entity the opportunity to investigate and obtain evidence promptly before claims become stale and the memory or availability of witnesses is compromised.<sup>27</sup> Prior to 1976, courts had no general discretion to allow late service of a notice of claim, and the grounds upon which late service might be granted were narrowly construed. Professor David Siegel notes that the case annotations in McKinney's § 50-e were "literally a graveyard of meritorious claims" barred by failure to fulfill the condition precedent.<sup>28</sup> The landscape changed dramatically with the 1976 amendment to § 50-e, which expanded judicial discretion to allow a late notice of claim so long as service took place before the statute of limitations had run, subject to applicable tolls and extensions.<sup>29</sup> Statutory factors a court is expressly empowered to consider include whether the defendant had actual knowledge of the facts constituting the claim within ninety days or a reasonable time thereafter, whether the defendant was substantially prejudiced by the delay, the disability of infancy, and all other relevant facts and circumstances.<sup>30</sup>

Academics have argued that it is inherently unreasonable to require infant-plaintiffs to file a timely notice of claim as a precondition to suit against a local governmental entity, as it conditions exercise of their legal rights upon an act which the minor is legally, physically, or intellectually incapable of performing.<sup>31</sup> Furthermore, it is poor public policy to require in-

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25. See *Sharapata*, 437 N.E.2d at 1106.

26. See DAVID D. SIEGEL, *NEW YORK PRACTICE* 36 (4th ed. 2005); see also *State v. Waverly Cent. Sch. Dist.*, 280 N.Y.S.2d 505, 507 (N.Y. App. Div. 1967).

27. See SIEGEL, *supra* note 26, at 36; *Waverly Cent. Sch. Dist.*, 280 N.Y.S.2d at 507.

28. SIEGEL, *supra* note 26, at 37.

29. The Amendment was drafted by Professor Paul S. Graziano at the request of the N.Y. State Judicial Conference. See Paul S. Graziano, *Recommendations Relating to Section 50-e of the General Municipal Law and Related Statutes*, in *THE JUDICIAL CONFERENCE AND THE OFFICE OF COURT ADMINISTRATION TWENTY-FIRST ANNUAL REPORT* 367–70 (1976).

30. N.Y. GEN. MUN. LAW § 50-e(5) (McKinney 2009).

31. See Jennifer M. Chow, *Civil Practice Law and Rules*, 69 ST. JOHN'S L.

fant-plaintiffs to rely on their parents or guardians whose ignorance of the law or disinterest may deprive the minor of the right to pursue their claim.<sup>32</sup> Although courts have the specific statutory discretion to allow the filing of a late notice of claim, New York appellate courts have stubbornly refused over the last five years to follow the Legislature's implicit direction in permitting these claims to be filed and the law suits to proceed.<sup>33</sup>

A uniquely vulnerable sub-class of infant-plaintiffs is brain-damaged newborn victims of obstetrical negligence, whose full extent of injury may not be evident until developmental milestones are reached years later. Such an infant-appellant eventually appeared before the New York Court of Appeals in 2006, requesting discretionary leave to file a late notice of claim against a county hospital.<sup>34</sup> The medical records, bolstered by expert interpretation, were replete with egregious disregard of the signs of mounting fetal distress and clear indications to deliver the baby by emergency C-section. These records arguably showed that the County had actual knowledge of the facts constituting the claim. However, the Court of Appeals affirmed the Appellate Division's decision to deny the application, forever barring the minor's claim.<sup>35</sup> The Court expressly stated that medical records, without more, do not fulfill the notice requirement of § 50-e.<sup>36</sup>

The authors believe that the New York Court of Appeals was wrong, both as a matter of law and of public policy. The flawed reasoning from the unfortunate 2006 decision has been perpetuated in a line of subsequent cases, thus denying equally vulnerable victims of neonatal negligence their day in court.<sup>37</sup> We therefore present the following alternative decision:

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REV. 675, 679–680 (1995).

32. See Scott A. DeVries, *Medical Malpractice Acts' Statutes of Limitation as they Apply to Minors: Are they Proper?*, 28 IND. L. REV. 413, 423 (1995).

33. See, e.g., *In re Gonzalez v. City of N.Y.*, 876 N.Y.S.2d 139, 140–41 (N.Y. App. Div. 2009); *Rowe v. Nassau Health Care Corp.*, 871 N.Y.S.2d 330, 332 (N.Y. App. Div. 2008); *Bucknor v. N.Y. City Health & Hosps. Corp.*, 844 N.Y.S.2d 100, 102–03 (N.Y. App. Div. 2007); *Rios v. Westchester County Healthcare Corp.*, 821 N.Y.S.2d 102, 103–04 (N.Y. App. Div. 2006).

34. *Williams v. Nassau County Med. Ctr.*, 847 N.E.2d 1154 (N.Y. 2006).

35. *Id.* at 1158.

36. *Id.* at 1157.

37. See *Gonzalez*, 876 N.Y.S.2d at 140–41; *Rowe*, 871 N.Y.S.2d at 332; *Bucknor*, 844 N.Y.S.2d at 102–03; *Rios*, 821 N.Y.S.2d at 103–04.

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**New York Court of Appeals****TYMEIK WILLIAMS, an Infant by His Mother and Natu-  
ral Guardian, Lekesha Fowler,  
APPELLANT**

v.

**NASSAU COUNTY MEDICAL CENTER, et al.,  
RESPONDENTS****[April 4, 2006]**

This case requires us to consider General Municipal Law § 50-e (5) in the context of an application by the mother of an infant claimant for leave to serve a notice of claim nearly ten years after alleged obstetrical negligence by Nassau County Medical Center left the infant with epilepsy and developmental disabilities. Exercising its discretion, the Nassau County Supreme Court granted leave to serve the late notice. The Appellate Division, however, reversed “on the law and as a matter of discretion.” *Williams v. Nassau County Med. Ctr.*, 786 N.Y.S.2d 207, 208 (N.Y. App. Div. 2004).

Abuse of discretion, as a matter of law, either shocks one’s sense of fairness or shocks the judicial conscience. *Kreisler v. N.Y.C. Transit Auth.*, 812 N.E.2d 1250, 1251 (N.Y. 2004). It is an abuse of a lower court’s discretion if its judgment is found to be “grossly unsound, unreasonable, illegal or unsupported by the evidence.” *Black’s Law Dictionary* 11 (9th ed. 2009). We find that the Appellate Division abused its discretion, and reverse on the law. Accordingly, Appellant’s motion for leave to serve late notice of claim is granted, and we remand for further proceedings consistent with this decision.

In General Municipal Law § 50-e, the Legislature made serving a notice of claim a condition precedent to bringing suit against a public corporation. N.Y. Gen. Mun. Law § 50-e (1)(a) (McKinney 2007) (amended 2010). Section 50-e(1) requires the notice to be served within ninety days after the claim accrues. *Id.* The notice of claim statute gave courts discretion to extend this time and provided criteria for determining when to grant extensions. Late service of an original notice of claim is a nullity if made without leave of court. *See Pierre v. City of New York*, 804 N.Y.S.2d 365, 366 (N.Y. App. Div. 2005). In *Cohen v. Pearl River Union Free School District*, 414 N.E.2d 639, 645

(N.Y. 1980), this court held that the time to apply for leave to file a late notice of claim was the same as the one year ninety day limitation period for bringing a tort action against a municipality.

In *Cohen*, we also considered “whether the period during which a court may grant an extension of time within which to serve notice of claim is tolled during the infancy of the claimant in accordance with C.P.L.R. 208.” *Id.* at 643. Because the limitation period for suing a municipal corporation is tolled during infancy, *id.* at 641, and since the time in which to seek leave to file a late notice of claim is expressly coextensive with that limitation period, *id.*, this court held that the time to apply for leave to file a late notice of claim is also tolled during the plaintiff’s minority. *See id.* at 644–45. However, pursuant to C.P.L.R. 208, if a person entitled to commence a medical malpractice action is under the disability of infancy at the time of accrual, the claimant is entitled to an infancy toll not to exceed ten years. N.Y. C.P.L.R. 208 (McKinney 2007). This ten-year period represents the outer time limit during which the medical malpractice infant plaintiff must apply for leave to file a late notice of claim or find his action barred. This potential defect is jurisdictional since a court lacks power to authorize service of late notice after the time within which to commence action has expired. *In re Turner v. N.Y.C. Hous. Auth.*, 663 N.Y.S.2d 254, 255 (N.Y. App. Div. 1997).

#### I.

General Municipal Law § 50-e(5) gives lower courts broad discretion to grant leave to serve a late notice of claim. *Cf. Henriques v. City of New York*, 803 N.Y.S.2d 194, 195 (N.Y. App. Div. 2005); *Seymour v. N.Y. City Health & Hosps. Corp.*, 801 N.Y.S.2d 370, 371 (N.Y. App. Div. 2005); *Little v. Nassau Health Care Corp.*, 790 N.Y.S.2d 465, 467 (N.Y. App. Div. 2005).

Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one. The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died

before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

An application for leave to serve a late notice shall not be denied on the ground that it was made after commencement of an action against the public corporation.

Gen. Mun. Law § 50-e(5) (McKinney 2007).

The statute directs courts to consider, in particular, whether within ninety days, or a reasonable time thereafter, the public corporation acquired actual knowledge of the facts underlying the claim. *Palazzo v. City of New York*, 444 F. Supp. 1089, 1092 (E.D.N.Y. 1978). The statute, as currently worded, appears to elevate the “actual knowledge” factor to a higher level of significance. *Id.* In determining whether to grant an extension, the lower court must also consider all other relevant facts and circumstances, including infancy and substantial prejudice to the municipality’s ability to defend the claim. N.Y. Gen. Mun. Law § 50-e(5) (McKinney 2007).

If a lower court does not abuse its discretion in granting leave to serve a late notice, its decision should not be disturbed on appeal. *See Colantuono v. Valley Cent. Sch. Dist.*, 399 N.Y.S.2d 262 (N.Y. App. Div. 1977). A court is not limited to the precise factors recited in the statute. *Beary v. City of Rye*, 377 N.E.2d 453, 455, 457 (N.Y. 1978). However, it is an abuse of discretion for a court to deny such an application without appropriate consideration of the statutory factors. *See Chmielewski v. City of New York*, 468 N.Y.S.2d 637 (N.Y. App. Div. 1983). It is also an abuse of discretion to deny such an application where the public corporation had actual knowledge of the essential facts constituting the claim, providing the delay did not result in prejudice to the municipality’s ability to defend on the merits. *Caminero v. N.Y.C. Health & Hosps. Corp.*, 800 N.Y.S.2d 173 (N.Y. App. Div. 2005)

## II.

### A.

The medical records of Nassau County Medical Center show that Lekesha Fowler was admitted to the labor and delivery floor at approximately 1:00 a.m. on September 10, 1993. She ruptured her membranes and experienced strong uterine

contractions about every two minutes. Vaginal exam showed the baby was at minus two station in the pelvis.<sup>38</sup> The admitting physician's assessment was "an intrauterine pregnancy at term in active labor," awaiting a vaginal delivery. Pl.-Appellant's Br. 14-15, A12-13, A22-23. The Chief Resident saw the patient at 5:15 a.m. Contractions continued every two to four minutes. The baby remained wedged at minus two station. Impression was dysfunctional labor. The plan was possible pitocin augmentation. Since the uterine contractions remained strong, the failure to progress could only be due to cephalopelvic disproportion — the fetal head was too large to pass safely through the mother's pelvis. Pl.-Appellant's Br. 15-16, A13-14. Dr. Robert Shaiman, Appellant's medical expert, explains the parameters of pitocin use in the William's delivery:

The only assessment of the pelvis performed was a clinical assessment in which the pelvis was described as "adequate with the spines not prominent and a hollow sacrum . . . [This assessment was inadequate to determine whether it was inappropriate to use pitocin, which is a powerful drug.] Prior to using such medication, it is absolutely essential for the physician to establish that the fetal head can safely fit through the bony pelvis, otherwise the combination of cephalopelvic disproportion and greatly increased contractions will force the fetal head through an inadequate pelvis and damage the fetal brain . . . [A]ssessment would include but not be limited to an ultrasound examination and pelvimetry.

Pl.-Appellant's Br. 15-16, A13-14.

At 6:40 a.m., signs of fetal distress first appeared. The fetal heart rate was described as non-reactive and non-reassuring. At 7:30 a.m., despite the adverse effect on the fetus, the pitocin infusion was increased to two milliunits per minute. Pl.-Appellant's Br. 16-17, A26. Between 8:00 a.m. and 11:30 a.m., decelerations of the fetal heart rate with a late component were ominous signs that the fetal head was being dangerously compressed into the narrow pelvis. Instead of recognizing the need to urgently deliver the baby by caesarean section, physicians merely increased the pitocin administration at a steady rate up to eight milliunits per minute, causing further fetal deteriora-

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38. The mechanism of delivering a child involves the passage of the baby through the mother's pelvis. Traditionally, generations of obstetricians have used a reference called "station." This measurement tells how far down the head of the baby has descended towards delivery. The station is based on the relation of the fetal head to two bony prominences called the ischial spines that mark the mid-pelvis (where the baby is halfway out). "Minus 2 station" means two cm. above the ischial spines. See DANFORTH'S OBSTETRICS & GYNECOLOGY 22-42 (James R. Scott et al. eds., 9th ed. 2003).

tion. The nurses notified Dr. Tom at 10:15 a.m. and Dr. Dray at 11:30 a.m. about the decelerations in fetal heart rate. At 12:15 p.m., the pitocin was reduced from eight to five milliunits. Pl.-Appellant's Br. 17–18, A14–16, A30. Signs of fetal distress continued as evidenced by a nonreactive fetal heart rate with variable decelerations. Pitocin was not discontinued until 2:30 p.m. Fetal distress was further evidenced by the baby's heart rate climbing from a baseline of 130–160 at 3:45 p.m. to 200 at 4:15 p.m. This, together with arrest of progression of labor, meant that immediate caesarean section was necessary to avoid fetal hypoxia—lack of oxygen and blood flow to the brain and vital organs. No caesarian section was forthcoming. Pl.-Appellant's Br. 18–19, A16–17.

In an attempt to deliver Tymeik Williams vaginally, a vacuum device was twice placed on his head to try to pull him out—failing each time. Then, forceps were used to pull his head out, lacerating his face. He was born with forceps marks on his head and a fractured clavicle. Pl.-Appellant's Br. 19, A17. Dr. Shaiman, Appellant's medical expert, described the traumatic birth following hours of dystocia (abnormal labor) from the cephalopelvic disproportion and pitocin augmented contractions:

The mother was unable to deliver the child by normal vaginal delivery due to dystocia, which is precisely why a cesarean section was indicated. In order to deliver this infant, two separate vacuum extractions were attempted and failed at 5:00 p.m. and 5:15 p.m. The vacuum extraction is undertaken by applying a vacuum cup to the presenting part, in this case the fetal head, to deliver the infant. Here, it is plain that the presenting part was so tightly wedged in the birth canal that the vacuum delivery was impossible and traumatic. Eventually, vaginal delivery was traumatically completed by the application of forceps to pull the newborn out, resulting in a third degree laceration.

Pl.-Appellant's Br. 19, A17.

Pediatricians were called to the delivery room for fetal distress. Despite tremors and other signs of newborn injury, the Apgar scores<sup>39</sup> (an index to evaluate the condition of a newborn infant, with ten being a perfect score) were eight and nine, above the level requiring resuscitation. Pl.-Appellant's Br. 20, A17–18. Dr. Shaiman explained how these relatively high scores are not inconsistent with the fetal brain injury:

In this case, the excessive pressure applied to the top of the infant's head as it is forced through the inadequate pelvis, propelled by excessive amounts of pitocin, caused an ischemia wherein the blood was

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39. *Id.* at 22–42.

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forced out of the brain. This results in a portion of the brain receiving a drastically reduced level of adequately oxygenated blood while the brain stem continues to receive adequate levels of adequately oxygenated blood.

Pl.-Appellant's Br. 20, A17-18.

Although a resident's note documents that the child suffered significant trauma, "[i]ncredibly, notwithstanding the hours of pitocin, the two failed vacuum extractions, the necessity of forceps, and the clear evidence of physical trauma to the infant, including a fractured clavicle, the physician's attestation form characterized the birth as a 'vaginal delivery without complicating diagnosis.'" *Id.*

Plaintiff suffers from seizures and a developmental cognitive disorder. Pl.-Appellant's Br. 21. Respondents argue that Plaintiff's disability was not apparent until the age of one or two. Electroencephalogram (EEG), used to test brain waves, was normal in 1995, but became abnormal in 1998 and 1999. Def.-Resp't's Br. 6.

While grand mal seizures were apparently first noted at approximately one year of age . . . it is extremely significant that the infant began to exhibit neonatal tremors within hours of birth despite serial [glucose levels] within normal limits . . . . [The nurse's] note documents not only tremors but also molding of the head, further indicia of the excessive pressure exerted on the fetal head during delivery. Further an MRI scan of his brain performed on 4/8/99 found patchy periventricular white matter . . . consistent with an asphyxic brain injury . . .

Pl.-Appellant's Br. 21, A18-19 (underlining omitted).

On October 11, 1999, an audiologist and speech pathologist found the infant claimant to be significantly delayed in speech and language development. Def.-Resp't's Br. 6. Mrs. Fowler supplied an affidavit attesting to her son's injuries:

My son has a seizure disorder, which is controlled by antiseizure medications. He is intellectually and developmentally delayed. He attends a special education school . . . . Although he is just short of ten years of age, I am advised that he functions at the level of a five year old. He can only read simple three letter words. He receives speech therapy three times a week and occupational therapy twice a week. I am advised that his seizures and intellectual and developmental problems are a result of brain injury which occurred during the labor and delivery process. He also suffered an injury to his penis due to a negligently performed circumcision at the Nassau County Medical Center.<sup>40</sup>

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40. A "Peds Procedure Note," dated 9/15/93, states in pertinent part: "dur-

Pl.-Appellant's Br. 21–22, A53a–53b.

B.

On September 4, 2003, almost ten years following his birth, Appellant mailed a notice of claim pursuant to § 50-e(5) to Nassau County and the hospital. The notice of claim alleged that Nassau County Medical Center performed:

[A] contraindicated pitocin augmentation and delivery by vacuum extraction and forceps, which care caused injury to the brain of the infant claimant, Tymeik Williams, and a fracture of his left clavicle. Thereafter, during the neonatal and pediatric care, the claimant . . . suffered injury to his penis as a result of a negligently performed circumcision in which excessive amounts of skin were removed ventrally and dorsally. . . . The infant claimant . . . suffered brain damage as a result of birth trauma and hypoxia resulting in cognitive deficits, developmental delays, speech delays, fetal distress, psychomotor delays and a seizure disorder.

Def.-Resp't's Br. 6–7.

Although Appellant commenced this action by moving to have the notice of claim deemed timely filed *nunc pro tunc*, the Nassau County Supreme Court deemed it a motion for an order granting leave to file a late notice of claim. *Williams v. Nassau County Med. Ctr.*, 786 N.Y.S.2d 207, 208 (N.Y. App. Div. 2004) (holding that the order to grant “the Plaintiff’s motion, *in effect*, for leave to serve a late notice of claim” is reversed) (emphasis added). By short order form dated January 9, 2004, Justice Anthony Parga held that Plaintiff’s failure to show a nexus between infancy and the delay in filing the late notice, and his failure to offer a reasonable excuse for the ten-year delay in making the instant application, were “not necessarily fatal when weighed against the factors of notice and the lack of prejudice to the municipality . . . .” See Pl.-Appellant’s Br. 7, A4; *Medley v. Chicon*, 761 N.Y.S.2d 666, 668 (N.Y. App. Div. 2003). The Supreme Court determined that the County had received timely actual notice of the facts constituting the claim:

The Second Department has distinguished medical malpractice cases from other types of negligence actions, and has “often” permitted “the service of a late notice of claim . . . in a medical malpractice action relating to the care and treatment of a patient because the hospital is in possession of the patient’s medical records and thus has actual notice of the underlying facts of the claim . . . .”

Pl.-Appellant’s Br. 7, A4.

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ing [circumcision] procedure excessive skin was cut both ventrally and dorsally . . . . Mother explained. Urosurgery and Plastic Surgery called.” Pl.-Appellant’s Br. A41.

As discovery proceeded in the action pending below, the County appealed to the Appellate Division. In a Decision and Order dated December 6, 2004, the Second Department reversed the Nassau County Supreme Court and denied the motion. *Williams*, 786 N.Y.S.2d at 208. The Appellate Division agreed with the trial court that Plaintiff had not established that the delay in seeking leave to serve the late notice was caused by his infancy and that the mother's ignorance that medical malpractice had caused her son's brain injury and her lack of awareness of the notice of claim requirement were unreasonable excuses. *Id.* at 209. The Appellate Division then held that defendant's possession of medical records did not give the defendants timely, actual knowledge of the claim and that plaintiffs had failed to show that the delay did not prejudice the defendants:

[W]e are not persuaded that the defendants had actual knowledge of the claim within the requisite 90-day period, or within a reasonable time thereafter. Although it is true they were in possession of the pertinent medical records, that did not establish that they had actual notice of the specific claim. Finally, the plaintiff failed to establish that the defendants would not be substantially prejudiced in maintaining their defense on the merits as a result of the lengthy delay in moving, in effect, for leave to serve a late notice of claim.

*Id.* (citations omitted).

Following the Appellate Division's decision, the County moved in Supreme Court to dismiss the complaint. Appellant cross-moved for leave to renew based on "evidence that came into existence" after the Supreme Court's January 9, 2004 Order. The new evidence, the fruit of normal discovery in the action pending below, consisted of depositions of three physicians present at Appellant's birth, as well as depositions of family members refuting the defense's assertion of a family history of seizure disorder. Pl.-Appellant's Br. 11. Appellant cited *D'Alessandro v. N.Y.C. Transit Authority*, 636 N.E.2d 1382, 1383 (N.Y. 1991), where the court held that in determining whether a mistake or omission in a notice of claim prejudiced a public corporation in investigating the claim, the court may consider evidence outside the four corners of the notice of claim). In an order ("Second Supreme Court Order") dated March 11, 2005, the Supreme Court denied Appellant's motion for renewal and granted the County's motion to dismiss. On March 30, 2005, Appellant filed a notice of appeal from this second order. Pl.-Appellant's Br. 11-12. We hear the case before us based on our June 30, 2005 grant of permission to ap-

peal. *Williams v. Nassau County Med. Ctr.*, 801 N.Y.S.2d 251, 252 (N.Y. 2005).

### III.

The courts have long recognized that medical records provide an extensive “paper trail” preserving the essential facts of a patient’s care and treatment. *Quiroz v. City of New York*, 546 N.Y.S.2d 604 (N.Y. App. Div. 1989); *Kavanaugh v. Mem’l Hosp. & Nursing Home*, 511 N.Y.S.2d 188 (N.Y. App. Div. 1987). Nonetheless, in reviewing such records, courts should be realistic, as is the Legislature, in recognizing institutional reluctance to confess fault or assign blame that could lead to liability. This reluctance extends to documentation by hospital staff members in records obtainable by patients and their attorneys. N.Y. Educ. Law § 6527(3) (McKinney 2006); N.Y. Pub. Health Law § 2805-m (McKinney 2006); *Logue v. Velez*, 699 N.E.2d 365, 367–68 (N.Y. 1998). Whether a municipal hospital’s medical records provide actual knowledge of the essential facts constituting a medical malpractice claim is the overarching concern of a court deciding an application to file a late notice of claim. The mandate of § 50-e(5) is specific and direct in this regard: “In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation . . . acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter.” Gen. Mun. Law § 50-e(5). This Court further recognizes that the convenient or ready means of acquiring knowledge is the legal equivalent of knowledge.

In order to decide what the essential facts of such a claim are, a court needs some basic medical interpretation of the hospital records. An expert affidavit has been found essential in proving the actual knowledge requirement of § 50-e(5):

Although it was not legally necessary that an application for leave to file a late notice of claim be accompanied by a C.P.L.R. 3012-a affidavit of merit, absent a medical opinion that respondent’s own records documented clinical signs that petitioner was developing hydrocephalus, petitioner would have been unable to establish that respondent acquired knowledge of the essential facts constituting the claim within a reasonable time following the accrual of the cause of action.

*McLaughlin ex rel. McLaughlin v. County of Albany*, 685 N.Y.S.2d 846, 848 (N.Y. App. Div. 1999).

Expert medical testimony is even necessary to explain to the trier of fact what is common knowledge among physicians. *States v. Lourdes Hosp.*, 792 N.E.2d 151, 154 (N.Y. 2003). The only recognized exception arises in those few cases involving

matters within the ordinary knowledge and experience of laypersons. *Mosberg v. Elahi*, 605 N.E.2d 353, 354 (N.Y. 1992) (dismissing allegation of miscarriage from improper removal of intrauterine contraceptive device due to plaintiff's failure to offer affidavit of merit from medical expert); *Fiore v. Galang*, 478 N.E.2d 188 (N.Y. 1985) (granting summary judgment to defendants in a failure to diagnose cancer claim: "[E]xcept as to matters within the ordinary experience and knowledge of laymen, in a medical malpractice action, expert medical opinion evidence is required to demonstrate merit"); *Ramirez v. County of Nassau*, 787 N.Y.S.2d 71, 72 (N. Y. App. Div. 2004) (granting infant plaintiff leave to serve late notice of claim for brain damage during delivery upon sufficiency of medical expert affidavit that medical records gave defendants actual knowledge of the facts constituting the claim).

Here, interpretation of Tymeik Williams' complex neonatal obstetrical records clearly lies outside of a layperson's knowledge and experience. Appellant's expert Dr. Shaiman, a duly licensed physician in the State of New York, affirms that: "[t]he departures from good and accepted standards of medical care in this case and the results of said departures are fully preserved and documented in the underlying medical records." Pl.-Appellant's Br. A14. Respondent submits no expert affirmation in opposition, but avers that the medical records of Appellant's birth do not provide actual knowledge of the essential facts constituting the claim. This conclusion is based on two assertions: first, that Dr. Shaiman has merely drawn his own inferences from the records, which can be challenged and, second, that Dr. Shaiman is not an obstetrician but is, in fact, an internist not board certified in any specialty. Def.-Resp't's Br. 28. Here, since Respondent has not proffered any expert medical opinion of its own despite ample opportunity to do so, we find this non-expert attack of counsel to be unavailing.

The County argues that, pursuant to § 50-e(5), the medical records must show the impact of the malpractice on the plaintiff and that the injury described must be related to the injury set forth in the notice of claim. Respondent further asserts: "While it may be that the County had knowledge of the facts of the mother and infant's treatment and condition, it is far different to conclude that it had knowledge of the specific claims being alleged; that is, failure to perform a caesarian section and improperly administering pitocin." Pl.-Appellant's Br. 38, A57

(arguing against the Second Department's holding, based on *In re Sica v. Bd. of Educ.*, 640 N.Y.S.2d 610, 611 (N.Y. App. Div. 1996); *Caruso v. County of Westchester*, 633 N.Y.S.2d 75, 76 (N.Y. App. Div. 1995); *Shapiro v. County of Nassau*, 616 N.Y.S.2d 786, 787 (N.Y. App. Div. 1994); *Falon v. County of Westchester*, 584 N.Y.S.2d 322, 323 (N.Y. App. Div. 1992), that the municipality had notice or knowledge of the specific claim) (underlining omitted). Furthermore, in *Williams*, the Second Department relied upon *Sica* and *Shapiro* in concluding that Defendants did not have actual knowledge of the claim within ninety days or a reasonable time thereafter. Although they possessed the medical records, "[t]he municipality must have notice or knowledge of the specific claim and not general knowledge that a wrong has been committed." *Shapiro*, 786 N.Y.S.2d at 208.

While we agree that mere knowledge of a "general wrong" is insufficient for purposes of the statute, the Second Department applied the wrong legal standard by holding that § 50-e(5) requires inquiry into whether the public corporation acquired knowledge of the specific claim instead of knowledge of the essential facts constituting the claim. This "notice of the specific claim" standard used by the Second Department in this and other cases, see *Seymour v. N.Y.C. Health & Hosps. Corp.*, 801 N.Y.S.2d 370, 371 (N.Y. App. Div. 2005), goes far beyond the statutory mandate of § 50-e(5). It is tantamount to a rule that a hospital's records must alert the municipality to the legal theory of the plaintiff's case, not just to the essential facts underlying the claim. Moreover, the County's argument ignores the fact that it is common for the impact of negligent medical care on a patient to become manifest only after a substantial period of time has elapsed. This is especially so for cerebral palsy and mental retardation, which often cannot be diagnosed until future developmental milestones are reached.

Respondent cites four cases where, admittedly, medical records did impart actual knowledge to the defendant municipality. In the first, *Caminero v. N.Y.C. Health & Hosps. Corp.*, 800 N.Y.S.2d 173 (N.Y. App. Div. 2005), a remarkable notation in the hospital records stated that the baby had suffered a "misadventure during medical care." *Id.* at 174. The infant lost a toe when a pulse oxygen monitor was wrapped too tightly around her foot. *Caminero* is an exceptional case where no expert testimony was needed to demonstrate the departures. Should Respondent's argument be accepted, the only instances

in which medical records give actual knowledge to the municipality are those in which the malpractice is within the understanding of a layperson—such as amputation of the wrong leg. We find this interpretation unduly restrictive.

Respondents cites three other cases which all used expert medical interpretation of the records to conclude that the actual knowledge prong of § 50-e(5) had been met: *Ramirez v. County of Nassau*, 787 N.Y.S.2d 71 (N.Y. App. Div. 2004); *Medley v. Cichon*, 761 N.Y.S.2d 666 (N.Y. App. Div. 2003); and *In re. Tomlinson v. New York City Health & Hospitals Corp.*, 593 N.Y.S.2d 565 (N.Y. App. Div. 1993). All three actions concerned allegations similar to those in the case before us—fetal brain damage during delivery due to obstetrical negligent failure to perform a caesarian section in the face of arrested labor and signs of fetal distress. Here, the County attempts to distinguish *Williams* by asserting that other factors besides obstetrical malfeasance are responsible for appellant's cognitive deficits and seizures. We find that this line of argument goes more to the ultimate merits of the case than to the adequacy of the notice requirement.

In the context of medical malpractice, while mere possession of medical records alone may be insufficient to provide actual knowledge of the facts constituting a claim, due to institutional reluctance to document deviations from standard of care, the actual knowledge requirement of § 50-e(5) should be liberally construed. In the instant case, the medical records necessary to investigate the circumstances underlying the claim were at all times within the municipal corporation's control. We find that Respondent's alleged lack of knowledge is without merit and that Appellants have met their statutory burden of proof.

#### IV.

The requirement of notice presupposes the existence of an individual capable of giving it. *Burgos v. City of New York*, 742 N.Y.S.2d 39 (N.Y. App. Div. 2002); *Green v. Village of Port Jervis*, 66 N.Y.S. 1042, 1043 (N.Y. App. Div. 1900). The maxim that the law does not compel people to do that which they cannot possibly perform supports the principle that physical and/or mental inability to comply with a filing deadline may excuse the noncompliance. We have long held that courts have a protective duty towards infants: "The courts are bound to protect infants, who are their wards." *Valdimer v. Mount Vernon Hebrew Camps, Inc.*, 172 N.E.2d 283, 284 (N.Y. 1961). In *Henry v.*

*City of New York*, 724 N.E.2d 372 (N.Y. 1999), we recently reaffirmed the special protections afforded infants under New York law:

This Court has consistently recognized the special status that is accorded an infant plaintiff by virtue of the infant's tender age; that status is not altered by the action or inaction of the infant's parent or guardian. . . . [I]t is the age and incapacity of the infant rather than the conduct of its parents and guardians which control.'

*Id.* at 374 (citation omitted).

Nonetheless, § 50-e(5) "merely confers upon the courts the authority to entertain the otherwise untimely applications of disabled claimants; it does not, however, dictate that such applications automatically be granted." *Cohen v. Pearl River Union Free Sch. Dist.*, 414 N.E.2d 639, 645 (N.Y. 1980).

In the instant case, the Second Department applied the wrong legal standard in requiring a "nexus" between claimant's infancy and the delay in filing a notice of claim: "In this case, the 10-year delay in moving, in effect, for leave to serve a late notice of claim was not the product of the plaintiff's infancy." *Williams*, 786 N.Y.S.2d at 208. The Appellate Division's error of law ignored the clear Legislative intent of the 1976 amendment to § 50-e(5) to eliminate the nexus requirement that infancy cause the delay: "Under the proposed new statute the court would be free to consider such disability as an element bearing upon the court's determination even though the disability may not have been the reason for the failure to serve the late notice." Judicial Conf. Rep. on C.P.L.R., 1976 N.Y. Sess. Laws 2089 (McKinney); *Giblin v. Nassau County Med. Ctr.*, 459 N.E.2d 856, 858 (N.Y. 1984). In *Beary v. City of Rye*, 377 N.E.2d 453, 455 (N.Y. 1978), this Court set forth, as an appendix to its opinion, the text of § 50-e(5) before and after the 1976 amendment. The relevant language was underscored as follows:

Pre-1976

5. The court, in its discretion, may grant leave to serve a late notice of claim within a reasonable time after the expiration of the time specified in subdivision one of this section in the following cases: (1) *Where the claimant is an infant, or is mentally or physically incapacitated, and by reason of such disability fails to serve a notice of claim within the time specified . . .*

Post-1976

5. Application for leave to serve a late notice. Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one. . . . In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation . . . acquired actual knowledge of the

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essential facts constituting the claim within the time frame specified or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: *whether the claimant was an infant*, or mentally or physically incapacitated . . . and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

*Beary*, 377 NE.2d at 455 (emphasis added).

Even before the 1976 amendments, this Court recognized that the textual requirement of a causal connection between infancy and the delay had been greatly eroded by judicial interpretation. In *Murray v. City of New York*, 282 N.E.2d 103 (N.Y. 1972), we held that it is presumed that infancy is linked to the failure to timely file a notice of claim. It does not have to be proven:

An infant of 19 may indeed lack the acumen to appreciate the source, or for that matter, the nature of the wrong allegedly perpetrated against him and, consequently, have been remiss in the proper assertion of his legal rights. The impediment may reasonably be presumed to attend infancy; there is no requirement that it be factually demonstrated.

*Id.* at 108 (citation omitted). As a result, the Second Department's nexus requirement is not only a misinterpretation of existing law, but would also remain an anachronism even if the Legislature had failed to repeal the "by reason of" language of pre-1976 § 50-e(5). In *Kurz v. N. Y. City Health & Hospitals Corp.*, 571 N.Y.S.2d 533 (N.Y. App. Div. 1991), the Second Department itself recognized the Legislative abrogation of the nexus requirement:

[T]here is no merit to the HHC's contention that the petitioner has failed to make the requisite showing that the delay in filing a notice of claim was a product of the children's infancy, and absent that showing, leave to serve a late notice must be denied. This requirement existed under a predecessor version of current General Municipal Law § 50-e(5). That predecessor section did indeed contain an express requirement limiting a court's discretion over late notice applications to situations, *inter alia*, "[w]here the claimant is an infant and by reason of such disability fails to serve a notice of claim within the time specified." As amended, however, this requirement was deleted. A petitioner is no longer required to establish that the delay is a product of the infancy.

*Id.* at 534 (citations omitted).

Despite its own precedent, and despite the fact that no other department weighs the lack of a causal nexus against the infant, *see, e.g., Ali ex rel. Ali v. Bunny Realty Corp.*, 676 N.Y.S.2d 166, 168 (N.Y. App. Div. 1998), the Second Depart-

ment has repeatedly ruled that the absence of a nexus between infancy and the delay militates against granting leave to serve a late notice of claim. *See Williams*, 786 N.Y.S.2d at 208; *Cotten v. County of Nassau*, 763 N.Y.S.2d 474, 475 (N.Y. App. Div. 2003); *In re. Matarrese v. N.Y.C. Health & Hosps. Corp.*, 633 N.Y.S.2d, 837, 838 (N.Y. App. Div. 1995); *Gandia v. N.Y.C. Hous. Auth.*, 571 N.Y.S.2d 52, 53 (N.Y. App. Div. 1991). The issue is not whether there is a conflict between the Second Department and other Departments within the Appellate Division, but whether there is a conflict between the Second Department and the clear Legislative intent behind amended § 50-e(5). Regarding amendments, this Court stated in *People ex rel. Sheldon v. Board of Appeals of New York*, 138 N.E. 416, 420 (N.Y. 1923): “We must assume that the lawmaking body intended to effect a material change in the existing law; otherwise the legislation would be nugatory.” In effect, the Second Department has rendered the 1976 amendment nugatory regarding the infancy factor.

Here, the Second Department found the County’s argument persuasive that if nothing other than the claimant’s infancy is asserted to excuse the failure to serve a timely notice, the conclusion that the delay was not a product of infancy entails the conclusion that there was no excuse for the delay. The County further averred that since no single factor among those listed in Subdivision 5 is necessarily dispositive, it is incumbent upon a court to consider all of the relevant facts and circumstances. The County concludes that it is, therefore, consistent with the statute to consider both whether the petitioner is an infant and whether the petitioner’s infancy caused—and thus provides a reasonable excuse for—the failure to serve a timely notice of claim. *Nardi v. County of Nassau*, 795 N.Y.S.2d 300, 301 (N.Y. App. Div. 2005); *Hendershot v. Westchester Med. Ctr.*, 777 N.Y.S.2d 743, 744 (N.Y. App. Div. 2004). We find that by conflating the disability of infancy with the non-textual factor of reasonable excuse, the text and Legislative history of the 1976 amendments are disregarded. It is, in effect, merely another thinly veiled attempt to maintain the repealed nexus requirement.

Whether the claimant was an infant is a factor among all other facts and circumstances a court should consider in its review of an application for leave to file a late notice of claim. The Second Department erred in applying the incorrect legal standard of a “nexus” requirement between infancy and the delay.

This requirement was expressly repealed by the legislature in 1976 and should no longer be considered in a court's exercise of its discretion.

V.

In *Williams*, 786 N.Y.S.2d. at 208, the Second Department applied the wrong legal standard by holding that the Plaintiff failed its burden of proof that the Defendant County would not be case specific. Imposing this burden of proof solely upon the claimant is unfair in the context of a late notice of claim because discovery is not available to the moving party prior to the application. The municipality is in a far better position to determine whether witnesses are no longer available, memories have faded, or documentary evidence has been lost. In fact, the United States Supreme Court has recognized that the party with superior access to evidence should have the burden of coming forward with proof of prejudice. *Campbell v. United States*, 365 U.S. 85, 96 (1961) (holding that the State had burden of proof when it enjoyed substantial advantages in access to information in robbery case). The County suggested that the applicable standard is comparable to the burden shifting paradigm used in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252–57 (1981), in the employment discrimination setting. The ultimate burden of proof on an application under Subdivision 5 always rests on the claimant. *Id.* at 252. When it comes to the issue of prejudice, the County has a burden of production, or of coming forward with some basis for asserting prejudice.

Although we recognize such precedent as controlling, access to evidence cannot be disregarded. The inquiry into whether substantial prejudice prevented the defendant municipality from maintaining its defense on the merits is very fact dependent. Among other considerations, allocation of burden of production and persuasion may depend on which party—plaintiff or defendant, petitioner or respondent—has made the affirmative allegation or presumably has peculiar means of knowledge. New York has followed the United States Supreme Court's lead in adhering to the principle that the party with superior access to a fact, or superior access to evidence of that fact, should bear the burden of proof. *See In re Louis Harris Assoc. v. de Leon*, 646 N.E.2d 438, 442 (N.Y. 1994) (placing the burden on the party with better access to information in a discrimination case); *Noseworthy v. City of New York*, 80 N.E.2d

744, 746 (N.Y. 1948) (holding that, in a wrongful death case where plaintiff is deceased, a lesser evidentiary burden is placed on plaintiff because they cannot testify in court).

Even under the County's proposed rule for burden shifting, and as adopted by the Second Department, Appellant has met his initial burden of proving lack of prejudice. The matters of actual knowledge and substantial prejudice are closely linked. All four departments of the Appellate Division have held that the possession of medical records that gave actual knowledge of the essential facts negates prejudice from delay. *See, In re. McMillan v. City of New York*, 718 N.Y.S.2d 819, 819 (N.Y. App. Div. 2001) (First Department holding: "respondents have been in possession of [Plaintiff's] medical records since the time of the alleged malpractice, and, accordingly, have not been prejudiced by the delay."); *Dunne v. Grello*, 579 N.Y.S.2d 707, 707 (N.Y. App. Div. 1992) (Second Department stating: "[i]nasmuch as the defendants in this case had actual knowledge of the essential facts constituting the subject claim by virtue of their exclusive possession of the pertinent medical records, they were not in any way prejudiced by the plaintiff's delay in serving a notice of claim."); *Kavanaugh v. Mem'l Hosp. & Nursing Home*, 511 N.Y.S.2d 188, 189 (N.Y. App. Div. 1987) (Third Department concluding: "given Memorial's actual notice [from its possession of medical records], it is unlikely that any prejudice could be established."); *Strobel v. County of Lewis*, 537 N.Y.S.2d 707, 707 (N.Y. App. Div. 1989) (Fourth Department holding: "[t]he hospital has not shown any prejudice as a result of the delay and, given its actual notice [from its possession of medical records], it is unlikely that any prejudice could be established.")

The primacy of medical records is especially compelling in a case where contraindicated medical treatment is administered to a patient. *See Salzano v. Maestrantoneo*, 699 N.Y.S.2d 45, 46 (N.Y. App. Div. 1999) ("the case involves defendants' alleged malpractice in prescribing and administering contraindicated medication to plaintiff and, as such, is not likely to turn on accounts of witnesses with dim memories of long ago events."). Here, claims concern both a contraindicated vaginal delivery and a contraindicated drug (pitocin). Witness recollection is rarely dispositive in medical malpractice actions. *See Leeds v. Lenox Hill Hosp.*, 775 N.Y.S.2d 260, 261 (N.Y. App. Div. 2004) (observing that "it appears that the trial will turn mainly on medical records rather than witnesses' memories"); *Noriega v. Presbyterian Hosp.*, 761 N.Y.S.2d 18, 19 (N.Y. App.

Div. 2003) (stating that “the case is likely to turn mainly on medical records rather than witnesses’ memories”).

This Court finds that Appellant has met his initial burden of proof by proffering expert interpretation of the medical records of Tymeik William’s traumatic birth, records which were at all times within the possession and control of Respondents. We further find that Respondents have failed their burden of production of admissible evidence under the burden shifting rule. “An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel.” *Burdine*, 450 U.S. at 255 n.9; see also *Ferrante v. Am. Lung Ass’n*, 665 N.Y.S.2d 25, 29 (N.Y. 1997) (stating that, “to rebut the presumption of discrimination,” the employer must “clearly set[] forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision”). Here, the attorney for the County offered only a bare assertion that Defendants’ were prejudiced because many of the doctors whose names appeared in the medical records were no longer employed at the hospital:

The names of the following physicians have been identified from the Nassau County Medical Center records attached as exhibits to plaintiff’s moving papers: [Respondents proceed to list seventeen names]. Upon information and belief, the source of that information being personnel records maintained at the Nassau University Medical Center as researched by the Department of Risk Management, of these seventeen physicians only two, Drs. Santana . . . and Carrasco, are still employed at the hospital.

Pl.-Appellant’s Br. 5–6, A57–58.

This statement was insufficient to show prejudice on three levels. First, no individual with personal knowledge of the hospital records swore to the truth of the information. *Cf. Shabazz v. Sheltering Arms Children’s Serv.*, 629 N.Y.S.2d 20, 21 (N.Y. App. Div. 1995) (finding no prejudice to the New York Housing Authority through “the mere fact that an employee who might have knowledge of the relevant circumstances had left the Authority’s employ”). Second, the County did not demonstrate that the former employee physicians were, in fact, unavailable or even that Defendants made a good faith effort to locate them through state and national physician registries. See *Caminero v. N.Y.C. Health & Hosps. Corp.*, 800 N.Y.S.2d 173, 175 (N.Y. App. Div. 2005) (finding that physician’s relocation out of state had not rendered him unavailable so as to prejudice hospital). In fact, the County itself used the New York State Department

of Health Physician Profile internet site to research the background of Appellant's expert Dr. Shaiman. The County needed to show it could not communicate with the witnesses or that the witnesses would not cooperate with the County's defense of the claim. Instead, the depositions of all three physicians present at claimant's birth were taken during pendency of the appeal to the Appellate Division. Third, the County failed to show that the absence of testimony from the remaining fifteen doctors would substantially prejudice its defense on the merits, when the information contained in the medical records provided the facts and information needed to investigate the claim. See *Medley v. Cichon*, 761 N.Y.S.2d 666, 668 (N.Y. App. Div. 2003) (finding absence of substantial prejudice on similar facts).<sup>41</sup> Because a plaintiff, on limited discovery, cannot hypothesize all possible defenses and then be expected to show that the defendant municipality continues to have access to all material witnesses, the Second Department itself has held that that the hospital's burden of production should include a showing that a meaningful line of defense has been foreclosed. See *Romanian Am. Interests, Inc. v. Scher*, 464 N.Y.S.2d 821, 824 (N.Y. App. Div. 1983) (holding that because plaintiff's attorney has a duty to prepare for affirmative defenses, the attorney bears the burden of proof of proving the affirmative defenses would succeed in an attorney malpractice case). Here, no such showing is forthcoming.

In the instant case, the New York City Health and Hospitals Corporation argues as an *amicus curiae* that the nearly ten-year delay in serving the notice of claim should be dispositive proof of prejudice. We find this assertion to be no more than unhappiness with either the Legislature's failure to shorten the infancy toll for medical malpractice to less than ten years or with this Court's ruling that the 1976 amendments to § 50-e(5) includes tolling periods. *Cohen*, 414 N.E.2d at 644. Appellant applied for leave to serve the late notice of claim before the expiration of the time in which to seek such relief. The proper inquiry is, therefore, whether the delay substantially prejudiced the ability of the public corporation to defend on the merits and not an abstract inquiry into the length of the delay.

The party asserting a defense of laches has the burden of

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41. In *Medley*, the medical records maintained by defendants indicated that during infant plaintiff's birth his head and neck were stuck in his mother's perineum for about five minutes, following which he required resuscitation and was born with an Apgar score of zero. 761 N.Y.S.2d at 667.

proving that the delay was prejudicial. *Love v. Spector*, 627 N.Y.S.2d 87, 88–89 (N.Y. App. Div. 1995). The Second Department has held: “[Respondent’s] conclusory allegations that it was prejudiced due to the mere passage of time was insufficient in light of the facts set out in the medical records and its failure to show what investigation, if any, it undertook.” *In re Speed v. A. Holly Patterson Extended Care Facility*, 781 N.Y.S.2d 135, 136–37 (N.Y. App. Div. 2004). Nonetheless, the Second Department has inconsistently applied its own rule. In *Seymour v. New York City Health & Hospitals Corp.*, 801 N.Y.S.2d 370, 372 (N.Y. App. Div. 2005), the court concluded: “[t]he obvious prejudice that has been suffered by the appellant as a result of the 10-year delay cannot be dismissed with a mere wave of the hand and the comment that the appellant has medical records in its possession.” (quoting *In re. Matarrese v. N.Y.C. Health & Hosps. Corp.*, 633 N.Y.S.2d 837, 839 (N.Y. App. Div. 1995)). In denying a brain injured infant plaintiff leave to serve a late notice, the *Seymour* court further admitted: “it is true that the defendant did not allege that the relevant personnel involved in the prenatal care and delivery of the infant plaintiff were unavailable.” *Id.* at 372.

Section 50-e(5) requires the notice of claim be served within ninety days or a reasonable time thereafter. What is “reasonable” is generally construed according to the facts and circumstances peculiar to the individual case. The Second Department summarized the applicable law in *Kurz v. New York City Health & Hospitals Corp.*, 571 N.Y.S.2d 533, 535 (N.Y. App. Div. 1991):

Furthermore, we reject the HHC’s argument that it will be unduly prejudiced by being compelled to defend this case. While the instant delay was just short of 10 years, similar lengthy delays have been excused where the interest of justice so warranted . . . . Moreover, the HHC has been in possession of the children’s medical records since the time of the alleged malpractice and thus had actual notice of the claim and the underlying facts within the limitation period . . . . The HHC should thus not be heard to complain of prejudice based upon its purely speculative argument.

In *Spaulding v. New York City Health & Hospitals Corp.*, 620 N.Y.S.2d 53 (N.Y. App. Div. 1994), the First Department held that defendant’s possession of medical records gave actual notice of the facts underlying infant plaintiff’s claim of brain damage resulting from defendant’s obstetrical malpractice. The court further found that given the “knowledge and resultant lack of prejudice, the almost 10 year delay in serving a notice of

claim should not be fatal.” *Id.* at 53.

This Court finds that Appellants have made the requisite showing of lack of substantial prejudice based on the extensive paper trail of medical records within the County’s possession, which at any time would have allowed investigation of the facts constituting the claim. We have previously held in *In re Diaz Chem. Corp. v. New York State Division of Human Rights*, 670 N.Y.S.2d 397, 398 (N.Y. 1998), that the party protesting the delay must show substantial actual prejudice. We find that Respondents have failed their burden of production of admissible evidence in this regard.

## VI.

Although the Judicial Conference refers to whether the applicant has a reasonable excuse for serving the late notice of claim, the text of General Municipal Law § 50-e(5) does not expressly enumerate the factor. Judicial Conf. Rep. on C.P.L.R., 1976 N.Y. Sess. Laws 2089, 2089–90 (McKinney). This stands in contrast to the first discretionary consideration set forth in the Court of Claims Act § 10(6) (McKinney 2009): “whether the delay in filing the claim was excusable.” Nonetheless, numerous courts have considered the existence of reasonable excuse in construing § 50-e(5). *See, e.g., Medley*, 761 N.Y.S.2d at 668; *Matarrese*, 633 N.Y.S.2d at 838.

In the instant case, both the trial court and the Appellate Division found that Appellant failed to offer a reasonable excuse for the delay. *Williams*, 786 N.Y.S.2d at 208. Ms. Fowler, the infant plaintiff’s mother, offered two excuses: first, that she learned only years later that her son’s seizures and developmental disorders were a result of brain injury from medical malpractice during labor and delivery and, second, that she was unaware of the notice of claim requirement as a condition precedent to suit against the municipal corporation. Pl.-Appellant’s Br. 22, A53a–53b. Although both are likely true, neither is legally sufficient to “excuse” a notice of claim served nearly ten years after accrual. *In re Magnotti v. City of New York*, 614 N.Y.S.2d 766, 767 (N.Y. App. Div. 1994) (finding ignorance of the notice requirement is not a sufficient excuse for failure to serve a timely notice of claim); *accord In re Gaffney v. Town of Hempstead*, 641 N.Y.S.2d 709, 710 (N.Y. App. Div. 1996). Appellant’s excuses join a list of believable yet insufficient explanations for such a delay. *See In re Drozdal v. Rensselaer City Sch. Dist.*, 716 N.Y.S.2d 435, 436 (N.Y. App. Div. 2000) (finding petitioner’s excuse that she was too preoccupied

with the child's problems and was not aware of the condition precedent unpersuasive); *Copeland v. N.Y.C. Hous. Auth.*, 575 N.Y.S.2d 283 (N.Y. App. Div. 1991) (law office failure not reasonable excuse); *Taverna v. City of New York*, 560 N.Y.S.2d 775 (N.Y. App. Div. 1990) (plaintiff's inability to speak English insufficient excuse).

Appellant further affirmed that a reasonable excuse for the late filing existed based upon his infancy and intellectual handicap and asked to be accorded the protections traditionally extended to infants and incompetents by the New York State courts. Pl.-Appellant's Br. 30-31 (citing Pl. Aff. 9-10, which cites *Trejo v. City of New York*, 548 N.Y.S.2d 208, 209 (N.Y. App. Div. 1989); *In re Potter v. Bd. of Educ.*, 350 N.Y.S.2d 671, 673-74 (N.Y. App. Div. 1974)). We find this argument unavailing. Section 50-e(5) lists infancy among "all other relevant facts and circumstances" to be considered by a court acting in its discretion whether to grant leave to serve a late notice of claim. The Legislature could have easily provided in the 1976 amendments that minority expressly excuses strict compliance with the timely notice requirement, but instead made no such exception. A court would be hard pressed to find a more sympathetic applicant than Tymeik Williams. Nonetheless, short of engrafting a judicial exception, the matter of reasonable excuse must be resolved by reference to the statute, no matter how unappealing the result may be: "[c]ourts, it is submitted, are not free to devise their own rules in a statutory field merely because their sense of justice impels them nor do courts sit as councils of revision on the legislative product." *In re Flannery v. State*, 399 N.Y.S.2d 88, 92 (N.Y. Ct. Cl. 1977).

In *Medley*, 761 N.Y.S.2d at 668, the Second Department stated:

Finally, we note that the existence or absence of a reasonable excuse for any delay is but one of the factors to consider. If there is timely notice and the absence of prejudice, even the absence of a reasonable excuse for failing to timely serve a notice of claim will not bar the granting of leave to serve a late notice of claim. Under the circumstances of this case, even were we to agree with the defendants that the plaintiffs' excuse for failing to timely serve a notice of claim was unreasonable, that is merely a factor to be considered and would not alone bar the granting of leave.

Every other department of the Appellate Division has also recognized that a reasonable excuse is not mandatory for a successful application for leave to serve a late notice. In fact, they have all ruled that leave can be granted if other factors out-

weigh the unreasonable excuse. *In re Porcaro v. City of New York*, 799 N.Y.S.2d 450, 452 (N.Y. App. Div. 2005) (First Department stating “the presence or absence of any one of the foregoing factors is not determinative . . . and the absence of a reasonable excuse is not, standing alone, fatal to the application”); *Drozdal*, 716 N.Y.S.2d at 436 (Third Department holding “the failure to offer a reasonable excuse for the delay in filing a notice of claim is not fatal where, as here, actual notice was had and there is no compelling showing of prejudice to respondents”); *Love v. City of Auburn*, 721 N.Y.S.2d 434, 435 (N.Y. App. Div. 2001) (Fourth Department stating “[t]he presence or absence of any one of the numerous relevant factors the court must consider is not determinative . . . and thus plaintiffs’ failure to offer any excuse for failing to serve a timely notice of claim is not fatal”).

This Court affirms the Appellate Division’s finding that Appellant lacked a reasonable excuse for the delay in serving the late notice of claim nearly ten years after accrual. However, in light of timely notice and the absence of prejudice, this defect is not fatal to Appellant’s application.

#### VII.

This Court finds that the Appellate Division abused its discretion in applying the wrong legal standards as follows: (1) incorrectly finding that detailed contemporaneous medical records at all times in Respondent’s possession failed to give them actual knowledge of the facts constituting the claim; (2) incorrectly requiring a nexus between infancy and the late notice of claim; (3) incorrectly placing the burden of proof that the municipality was not substantially prejudiced by the delay exclusively on the Appellant; (4) incorrectly finding that Appellant’s unreasonable excuse was fatal to his motion; and (5) failing to recognize that, as a matter of public policy, the discretionary factors of General Municipal Law § 50-e(5) should be liberally construed in favor of a physically and mentally disabled infant applicant whose legal rights depend solely on the action or inaction of third parties.

Accordingly, we reverse the order of the Appellate Division on the law and as a matter of public policy. Appellant’s application for leave to serve a late notice of claim is hereby granted pursuant to the order of the trial court, and the matter is remanded for further proceedings in accordance with this opinion.

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## AUTHORS' COMMENTS

Notice of claim provisions are a vestige of the ancient English common law principle that the King can do no harm.<sup>42</sup> Its practicalities were such that the English King enjoyed complete, personal immunity and that no court could obtain jurisdiction over him without his consent.<sup>43</sup> The United States Supreme Court adopted the sovereign immunity doctrine in *Cohen v. Virginia*, with Chief Justice Marshall finding that the doctrine was "universally received" and explaining "that the United States cannot be sued . . . [b]ecause it is incompatible with their sovereignty. The States, before the adoption of the federal constitution, were also sovereign; and the same principle applies, unless it can be shown that they have surrendered this attribute of sovereignty."<sup>44</sup> The doctrine has slowly eroded over time due to concerns that the insurmountable barrier creates harsh results and poses a threat to an injured citizen's legitimate claim against the state. The California Supreme Court referred to sovereign immunity as "an anachronism, without rational basis, [which] has existed only by the force of inertia."<sup>45</sup> Colorado's highest court has opined that sovereign immunity "may be a proper subject for discussion by students of mythology but finds no haven or refuge in this Court."<sup>46</sup> The Florida Supreme Court suggested that disapproval of the doctrine of sovereign immunity was one reason that the Declaration of Independence was created and the Revolutionary War occurred, and the court further argued that the doctrine was "anachronistic not only to our system of justice but to our tradition concepts of democratic government."<sup>47</sup> Washington's highest court simply declared, "[w]e closed our courtroom doors without legislative help, and we can likewise open them."<sup>48</sup>

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42. Edwin Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 2 (1924).

43. *Id.* at 4.

44. *Cohen v. Virginia*, 19 U.S. 264, 308, 411 (1821).

45. *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457, 460 (Cal. 1961) (en banc).

46. *Colo. Racing Comm'n. v. Brush Racing Ass'n.*, 316 P.2d 582, 585 (Colo. 1957) (en banc).

47. *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 132 (Fla. 1957).

48. *Pierce v. Yakima Valley Mem'l Hosp. Ass'n.*, 260 P.2d 765, 774 (Wash.

Abrogation of sovereign immunity has only been partial, however, with notice of claim provisions remaining a substantial bar to otherwise meritorious suits. It is patently difficult to review, investigate, and serve a notice of claim within the New York statutory ninety days, especially if one has not had time to retain an attorney.<sup>49</sup> The degree of difficulty in meeting the condition precedent increases when the claimant is an infant. Despite the protected status of infants under tort law, constitutional challenges to statutes requiring strict compliance of minors to notice of claim provisions have been reviewed under the rational basis test with predictable results.<sup>50</sup> Infants have been found to possess no fundamental right to sue the government, nor are they a suspect class.<sup>51</sup> Nevertheless, both equal protection<sup>52</sup> and due process challenges<sup>53</sup> have generally failed. It is not unconstitutional to require infants to comply with notice of claim provisions.<sup>54</sup>

To hold it inessential to file a notice of claim would render the underlying statute nugatory—a meaningless, purposeless legislative gesture. The claimant could simply serve a notice of claim whenever they chose to do so. Not so, say courts adopting the majority position of strict compliance. The majority approach holds that the right to sue a political subdivision is sole-

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1953) (en banc).

49. Daniel Kramer, *Torts*, 42 SYRACUSE L. REV. 737, 739 (1991) (discussing important decisions in 1990 tort cases and their effects).

50. J. James Frasier III, *A Review of Issues Presented by § 11-46-11 of the Mississippi Tort Claims Act: The Notice Provisions and Statute of Limitations*, 65 MISS. L.J. 643, 713 (1996) (discussing Mississippi's notice of claim and statute of limitations provisions and assessing similar provisions and case law in other states).

51. *Id.*

52. *See, e.g.*, *Langevin v. City of Biddeford*, 481 A.2d 495, 497–98 (Me. 1984) (requiring minor claimants to comply with the notice requirements was rationally related to the state's interests in avoiding stale claims, reducing litigation costs and fostering out-of-court settlements); *But cf.* *Scott v. Sch. Bd.*, 568 P.2d 746, 747–48 (Utah 1977) (statute which did not expressly exempt minors from its requirements violated due process and equal protection rights of persons who had no standing to sue in their own behalf, and whose parents had no legal duty to sue for them).

53. *See, e.g.*, *Ocampo v. City of Racine*, 137 N.W.2d 477, 480–81 (Wis. 1965) (rejecting plaintiff's argument that notice of claim requirement violated her due process rights since it predicated her suit on an act which she was unable to perform and reasoning that since the notice requirement could be fulfilled by a parent or guardian on behalf of the infant claimant, it was not an unreasonable restriction on the minor's legal rights).

54. Frasier, *supra* note 50, at 713.

ly a statutory right that requires strict compliance with any legislative prerequisites.<sup>55</sup> The express statutory requirement of a written notice of claim is not satisfied by anything less than presentment of such. Only two jurisdictions, Minnesota and New York, have held that actual notice of an incident may sometimes avoid the trap that statutory notice of claim requirements pose for unwary claimants.<sup>56</sup>

Courts adopting the minority position that infancy per se is a proper basis for relief from limitations placed on filing medical malpractice claims adhere to the principle that conditioning a minor's legal rights on an act that she is legally, physically, or intellectually incapable of performing is inherently unreasonable.<sup>57</sup> It is patently unfair and poor public policy to require the infant plaintiff to rely on parents or guardians who may lack concern, knowledge, or timeliness in their actions.<sup>58</sup> The minority position espouses that it is inequitable to require persons who lack the physical, mental, or emotional skills to drive an automobile to file a notice of claim within the prescribed period or forever lose their right to recover for their injuries.<sup>59</sup> Statutes which require minors to strictly comply with conditions precedent to the commencement of a lawsuit hurt infants and protect potentially negligent physicians, health care providers, and hospitals, increasing societal harm.<sup>60</sup> Not surprisingly,

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55. *E.g.*, *Goncalves v. S.F. Unified Sch. Dist.*, 332 P.2d 713, 715 (Cal. Dist. Ct. App. 1958) (reasoning that the right to sue local government is purely statutory, which the legislature has the power to restrict).

56. *Kossak v. Stalling*, 277 N.W.2d 30, 32-33 (Minn. 1979) (adopting a substantial rather than strict compliance approach to notice of claim requirement); *Matey v. Bethlehem Cent. Sch. Dist.*, 391 N.Y.S.2d 357, 358, 360 (N.Y. Special Term 1977) (finding that infant petitioner injured on trampoline during gym class satisfied notice requirement of § 50-e(5) when his parents wrote a letter to the school district superintendent regarding the nature of accident and injuries within ninety days of accrual and when they timely met with school district's insurance representatives regarding compensation for expenses above and beyond infant's health insurance offsets in an effort to prevent litigation).

57. *See DeVries, supra* note 32, at 422-23, 446 (pointing out several problems with requiring minors to comply with the statute of limitations such as the difficulty minors have acquiring a competent attorney and further stating that minors "cannot be expected to know that such a thing as a lawsuit even exists nor how to pursue it"). *See also* Jennifer Chow, *Civil Practice Law and Rules*, 69 ST. JOHN'S L. REV. 675, 677 (1995).

58. *DeVries, supra* note 32, at 423.

59. *See id.* at 446.

60. *See id.* at 446.

courts holding that minority status is an exemption from compliance with notice of claim provisions have generally found statutes containing no such express exception unconstitutional.<sup>61</sup>

New York has traditionally adopted the majority position of strict compliance with statutory notice of claim provisions. Prior to 1976, the grounds upon which a court might allow service of a late notice of claim were narrow and were narrowly construed. Courts had no general discretion to permit a late filing. This changed with the 1976 amendments to § 50-e(5), which listed statutory factors that a court could consider, together with all other relevant facts and circumstances, in acting in its discretion whether to grant an application to serve a late notice.<sup>62</sup> Also eliminated was the “by reason of” language that required a nexus between infancy and the delay.<sup>63</sup> A court could now consider simply “whether the claimant was an infant, or mentally or physically incapacitated.”<sup>64</sup> The expanded judicial discretion granted under the 1976 amendments came with a cutoff—a court cannot extend the time in which to serve a late notice beyond the applicable time in which to commence the action.<sup>65</sup> The court of appeals held in *Cohen* that the time in which to seek leave to serve a late notice of claim is tolled by infancy for a period not to exceed ten years.<sup>66</sup>

Despite these softening doctrines, New York claimants are still vulnerable to the paradox of a municipality escaping liability if the injuries suffered by the individual are so catastrophic such as to make it impossible to comply with the terms of the notice of claim statute within the requisite time period. This is

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61. *Schumer v. City of Perryville*, 667 S.W.2d 414, 415–416, 418 (Mo. 1984) (finding minor’s due process rights violated by conditioning the exercise of his valid cause of action on an act which he was legally powerless to perform); *Turner v. Staggs*, 510 P.2d 879, 882–83 (Nev. 1973) (holding arbitrary division of class along the lines of governmental versus private torts violated equal protection because it was without rational relation to the historical purpose of notice of claim statutes); *McCrary v. City of Odessa*, 482 S.W.2d 151, 153–54 (Tex. 1972) (stating that minors of tender years have long been exempt from complying with notice of claim statutes under the principle that such provisions are not to be enforced against persons incapable of comprehending and complying with them).

62. N.Y. GEN. MUN. LAW § 50-e(5) (McKinney 2007) (amended 2010).

63. *Id.*

64. *Id.*

65. Graziano, *supra* note 29, at 362.

66. *See Cohen v. Pearl River Union Free Sch. Dist.*, 414 N.E.2d 639, 640 (N.Y. 1980) (citing Graziano, *supra* note 29, at 370).

precisely the inapposite result the New York Court of Appeals handed down in *Williams*.<sup>67</sup> Courts have been reluctant to engraft a judicial exception to the notice of claim requirement of § 50-e(5) even for the most vulnerable subclass of plaintiffs—infants suffering mental and physical disability due to birth trauma, the full manifestations of which are not apparent until developmental milestones are reached years later. Until a future legislative amendment corrects this injustice, it is of critical importance to get *Williams* and other similar cases right.

Unfortunately, the tragedy of the *Williams* holding is not Tymeik Williams' alone to bear. The flawed reasoning, based upon mistakes of law, has been perpetuated in a string of recent cases from the Second Department, all similarly denying vulnerable infant plaintiffs their day in court. In *Rios*, even though the notice was only thirteen months late, leave was denied because the delay was not the product of the plaintiff's infancy and medical records did not give defendants actual knowledge of the facts surrounding the claim of negligent birth trauma.<sup>68</sup> In *Bucknor*, birth trauma from a delay in performing a C-section caused the infant to develop autism and a pervasive developmental disorder.<sup>69</sup> In denying leave to serve a late notice almost ten years after alleged malpractice, the court concluded that the delay was not directly attributable to the plaintiff's infancy.<sup>70</sup> Contemporaneous medical records continually in the possession and control of defendants gave "scant reason to identify or predict any lasting harm to the child, let alone a developmental disorder."<sup>71</sup> In *King*, plaintiff's request to serve a late notice of claim seven years after the cause of action for negligent birth trauma arose was denied because the delay was not "the product of the infant petitioner's infancy or the need to provide him with extraordinary care."<sup>72</sup> In *Rowe*, petition to serve a late notice was denied because the delay was not the

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67. See *Williams v. Nassau County Med. Ctr.*, 847 N.E.2d 1154 (N.Y. 2006).

68. *Rios v. Westchester County Healthcare Corp.*, 821 N.Y.S.2d 102, 103 (N.Y. App. Div. 2006).

69. *Bucknor v. N.Y.C. Health & Hosps. Corp.*, 844 N.Y.S.2d 100, 102 (N.Y. App. Div. 2007).

70. *Id.*

71. *Id.* at 103.

72. *In re King v. N.Y.C. Health & Hosps. Corp.*, 840 N.Y.S.2d 611, 612–13 (N.Y. App. Div. 2007).

product of claimant's infancy, there was no reasonable excuse for the delay, and, even if defendants possessed the pertinent medical records, plaintiff failed to establish that the corporation would not be substantially prejudiced by the delay.<sup>73</sup> In *Ali*, petitioner was not entitled to serve a late notice of claim because the nine-year delay was not directly attributable to his infancy, and plaintiff failed to prove that the hospital had not been substantially prejudiced in maintaining its defenses on the merits.<sup>74</sup> Finally, in *Gonzalez*, application for leave to serve late notice of claim was denied because the hospital's possession of medical records did not establish actual knowledge of the facts constituting the claim of failure to diagnose hypotonia<sup>75</sup> and hip dysplasia, no reasonable excuse was offered, and the delay could not be attributed to claimant's infancy.<sup>76</sup>

There exists an exception. In 2007, a year after the final *Williams* appeal, the Second Department affirmed the grant of leave to serve a late notice of claim for an infant suffering severe brain damage during delivery.<sup>77</sup> The court reasoned that the medical records possessed by the hospital "documented her injuries at birth, the care given to her, the procedures performed, and the time of the alleged malpractice."<sup>78</sup> Thus the defendants "had actual notice of the essential facts underlying the claim."<sup>79</sup> The infant also provided a reasonable excuse for the delay.<sup>80</sup>

More recently, the New York Court of Appeals reconsidered the issue of discretionary leave to grant a § 50-e(5) late notice of claim in the context of a pediatric lead poisoning claim.<sup>81</sup> In *Pearson*, infant patient's mother brought a medical malpractice action against a New York City hospital alleging, *inter alia*, that defendant failed to perform a risk assessment or

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73. *Rowe v. Nassau Health Care Corp.*, 871 N.Y.S.2d 330, 332 (N.Y. App. Div. 2008).

74. *In re Ali v. N.Y.C. Health & Hosps. Corp.*, 877 N.Y.S.2d 221, 222–23 (N.Y. App. Div. 2009).

75. Medical condition of diminished muscle tone. BLAKISTON'S GOULD MEDICAL DICTIONARY 652 (4th ed. 1979).

76. *In re Gonzalez v. City of New York*, 876 N.Y.S.2d 139, 140 (N.Y. App. Div. 2009).

77. *In re Corvera v. Nassau County Health Care Corp.*, 833 N.Y.S.2d 537, 537 (N.Y. App. Div. 2007).

78. *Id.* at 538.

79. *Id.*

80. *Id.*

81. *Pearson v. N.Y.C. Health & Hosps. Corp.*, 889 N.E.2d 493 (N.Y. 2008).

provide anticipatory guidance for lead poisoning.<sup>82</sup> The Court of Appeals, in affirming the order of the First Department *en banc*, agreed that leave to serve a notice of claim six months late was properly granted.<sup>83</sup> In its short memorandum order, the Court of Appeals referred to the more substantial First Department decision.<sup>84</sup> The appellate division held that:

'The statute [General Municipal Law § 50-e(5)] contains a nonexhaustive list of factors that the court should weigh, and compels consideration of all relevant facts and circumstances. This approach provides flexibility for the courts and requires them to exercise discretion.' Since the statute is remedial in nature, it should be liberally construed.

The motion court properly took into account the pertinent statutory considerations, 'including the simple fact of infancy', that it would be 'unfair and unjust' to deprive the infant of a remedy based on her mother's ignorance of the law, and defendant's possession of medical records affording it actual knowledge of the essential facts constituting the claim that it negligently failed to perform a risk assessment or provide anticipatory guidance for lead poisoning, and the consequent absence of prejudice, stemming from the late notice, to its ability to defend against the claim.<sup>85</sup>

The court specifically noted that there was evidence in the record that elevated levels of lead in the infant plaintiff's blood were known to cause brain damage and affect neuropsychiatric development.<sup>86</sup> The court also concluded that the extent of such injury could not be fully evaluated until the child is at least seven years old.<sup>87</sup> It is this recognition, that the true impact of the injury was delayed and not readily apparent until later developmental milestones, that distinguishes *Pearson* from *Williams*. As a result of this epiphany, the First Department, as affirmed by the Court of Appeals, granted plaintiff's motion to voluntarily discontinue the lawsuit without prejudice pursuant to N.Y. C.P.L.R. 3217(c),<sup>88</sup> with leave to renew when the minor

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82. *Pearson v. N.Y.C. Health & Hosps. Corp.*, 840 N.Y.S.2d 25, 27 (N.Y. App. Div. 2007).

83. *Pearson*, 889 N.E.2d at 493.

84. *Id.*

85. *Pearson*, 840 N.Y.S.2d at 27 (citations omitted).

86. *Id.*

87. *Id.*

88. N.Y. C.P.L.R. 3217 (McKinney 2005) (stating in pertinent part in regards to voluntary discontinuance "(b) By order of court. . . an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper. . . (c) Effect of discontinuance. Unless otherwise stated in the notice, stipulation or order of dis-

was eight years old and the full extent of the injuries were determinate.<sup>89</sup>

The other striking feature of *Pearson* is the substantial compliance approach used by the court to construe the notice of claim requirement:

While the dissent asserts that defendant was prejudiced by plaintiff's delay in seeking to serve a late notice of claim until almost two years after the infant's last appointment at Harlem Hospital, it neglects to note that plaintiff served a notice of claim, albeit without leave of court . . . just over six months after her daughter's last appointment.<sup>90</sup>

The significance was not lost on the dissent: “[i]t is well settled, however, that a late notice of claim served without leave of court is a nullity.”<sup>91</sup>

The New York Court of Appeals took a step in the right direction in *Pearson*. Whether the impact of the case as *stare decisis* extends beyond the narrow context of infant lead poisoning is unclear at present. The dissent in the First Department's opinion raised the omnipresent specter of *Williams*: “[t]ellingly, the majority does not address the above-quoted language from *Williams* regarding the insufficiency of the mere creation and retention of medical records to establish the knowledge of a defendant of the essential facts of a claim.”<sup>92</sup>

It is our sincere hope that this review will lead to a critical reexamination of the New York Court of Appeals decision in *Williams*, as well as to an increased awareness of the uniquely vulnerable status of infant plaintiffs under the technical statutory rules for timely service of notice of claims. Short of a judicially engrafted exception, the ultimate correction of this injustice will fall on the legislature to further amend the current, existing version of N.Y. General Municipal Law § 50-e(5).

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continuance, the discontinuance is without prejudice . . .”).

89. 840 N.Y.S.2d at 27.

90. *Id.*

91. *Id.* at 29 (citing *Mack v. City of New York*, 696 N.Y.S.2d 206, 207 (N.Y. App. Div. 1999)).

92. *Id.*